

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CHRIS MANZO,

Plaintiff,

vs.

RIO CASINO & HOTEL, et al.,

Defendant,

Case No. 2:14-cv-00172-JAD-GWF

ORDER

Amended Application to Proceed *in Forma Pauperis* (#5) and Complaint (#1-1)

This matter comes before the Court on Plaintiff's amended Application to Proceed *in Forma Pauperis* (#5) and Complaint (#1-1), filed on June 19, 2014.

BACKGROUND

Plaintiff brings this action pursuant to Title VII of the Civil Rights Act, alleging claims for age discrimination and retaliation. Plaintiff contends that he was employed in the culinary unit with the Rio Hotel & Casino in Las Vegas, Nevada, where he was subjected to discrimination based on his age. Specifically, he alleges that on various occasions, he was cursed at by Chef Frank Saouat, called an "old man" and told to quit his job. He alleges that he filed a complaint with the Equal Employment Opportunity Commission ("EEOC") and the Culinary Union, who found Plaintiff did not have sufficient evidence to support a claim for discrimination. Plaintiff requests back pay in the amount of \$50,000.00 and requests reinstatement of his prior position in the culinary unit.

DISCUSSION

I. Application to Proceed In Forma Pauperis

Plaintiff filed this instant action and attached a financial affidavit to his amended Application and Complaint as required by 28 U.S.C. § 1915(a). Having reviewed Plaintiff's

1 financial affidavit under section 1915, the Court finds that Plaintiff is unable to pre-pay the filing
2 fee. Therefore, Plaintiff's request to proceed in forma pauperis in federal court is granted.

3 **II. Screening of Complaint**

4 Upon granting a request to proceed *in forma pauperis*, a court must additionally screen a
5 complaint pursuant to 28 U.S.C. § 1915(e). Specifically, federal courts are given the authority to
6 dismiss a case if the action is legally “frivolous or malicious,” fails to state a claim upon which
7 relief may be granted, or seeks monetary relief from a Defendant/Third Party Plaintiff who is
8 immune from such relief. 28 U.S.C. § 1915(e)(2). A complaint, or portion thereof, should be
9 dismissed for failure to state a claim upon which relief may be granted “if it appears beyond a
10 doubt that the plaintiff can prove no set of facts in support of his claims that would entitle him to
11 relief.” *Buckey v. Los Angeles*, 968 F.2d 791, 794 (9th Cir. 1992). A complaint may be dismissed
12 as frivolous if it is premised on a nonexistent legal interest or delusional factual scenario. *Neitzke*
13 *v. Williams*, 490 U.S. 319, 327–28 (1989). Moreover, “a finding of factual frivolousness is
14 appropriate when the facts alleged rise to the level of the irrational or the wholly incredible,
15 whether or not there are judicially noticeable facts available to contradict them.” *Denton v.*
16 *Hernandez*, 504 U.S. 25, 33 (1992). When a court dismisses a complaint under § 1915(e), the
17 plaintiff should be given leave to amend the complaint with directions as to curing its deficiencies,
18 unless it is clear from the face of the complaint that the deficiencies could not be cured by
19 amendment. *See Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

20 **A. Plaintiff's Complaint**

21 Here, Plaintiff failed to attach his Complaint with his Amended Application to Proceed *in*
22 *Forma Pauperis* (#5). Considering Plaintiff's *pro se* status, however, the Court will screen
23 Plaintiff's Complaint (#1-1) attached to his initial Application to Proceed *in Forma Pauperis* (#1).

24 **1. Discrimination Claims**

25 It appears Plaintiff is attempting to state a claim for discrimination and retaliation under
26 Title VII of the Civil Rights Act. *See* 42 U.S.C. § 2000e et seq. Title VII allows persons to sue an
27 employer for discrimination on the basis of race, age, color, religion, gender or national origin if he
28 or she has exhausted both state and EEOC administrative procedures. Once plaintiff files charges

1 with the EEOC, the commission will investigate the charges, attempt to reach a settlement, and
2 decide whether to sue the employer or refer the decision to sue to the Attorney General if the
3 charges are against a state or local governmental entity. *Id.* If the EEOC or Attorney General
4 decides not to sue and if there is no settlement that is satisfactory to plaintiff, the EEOC will issue
5 plaintiff a right-to-sue letter and plaintiff will have exhausted his remedies with the EEOC. *See* 42
6 U.S.C. § 2000e-5(f)(1). After receipt of the right to sue letter, plaintiff may sue in federal or state
7 court. *Id.*; *see also Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 825-26, 110 S.Ct. 1566,
8 108 L.Ed.2d 834 (1990). Here, Plaintiff states that he filed grievances with the EEOC and Culinary
9 Union. Plaintiff did not, however, attach the EEOC right-to-sue letter, nor did he indicate the date
10 on which the right-to-sue letter was issued to show that he filed his case within 90 days pursuant to
11 Title VII of the Civil Rights Act. *See* 42 U.S.C. § 2000e et seq. Plaintiff therefore failed to
12 establish that he has exhausted his administrative remedies.

13 Furthermore, in order to prove a prima facie case of discrimination in violation of Title VII,
14 Plaintiff must establish: (a) he belonged to a protected class; (b) he was qualified for his job; (c) he
15 was subjected to an adverse employment action; and (d) similarly situated employees not in his
16 protected class received more favorable treatment. *Moran v. Selig*, 447 F.3d 748, 753 (9th Cir.
17 2006) (citing *Kang v. U. Lim Am., Inc.*, 296 F.3d 810, 818 (9th Cir.2002)).

18 Plaintiff failed to plead sufficient allegations to state a claim for age discrimination. The
19 Age Discrimination in Employment Act (ADEA) only forbids age discrimination against people
20 who are age forty (40) or older. Here, Plaintiff failed to indicate his age and therefore failed to
21 establish that he belonged to a protected class. Furthermore, Plaintiff failed to plead facts to
22 establish he was qualified for his job and that those similarly situated employees not in his
23 protected class received more favorable treatment. Plaintiff's Complaint (#1-1) therefore fails to
24 state a claim upon which relief can be granted. Accordingly,

25 **IT IS HEREBY ORDERED** that Plaintiff's Application to Proceed In Forma Pauperis
26 (#5) is **granted**. Plaintiff shall not be required to pay the \$400.00 filing fee.

27 **IT IS FURTHER ORDERED** that Plaintiff is permitted to maintain this action to
28 conclusion without the necessity of prepayment of any additional fees or costs or the giving of

1 security therefor. This Order granting leave to proceed in forma pauperis shall not extend to the
2 issuance of subpoenas at government expense.

3 **IT IS FURTHER ORDERED** that the Clerk of the Court shall file Plaintiff's Complaint
4 (#1-1).

5 **IT IS FURTHER ORDERED** that the Complaint is **dismissed** without prejudice for
6 failure to state a claim upon which relief can be granted, with leave to amend in accordance with
7 the discussion above. Plaintiff shall have **thirty (30) days** from the date that this Order is entered
8 to file his Amended Complaint, if he believes he can correct the noted deficiencies. Failure to
9 comply with this Order may result in the dismissal of this action.

10 DATED this 20th day of June, 2014.

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13 GEORGE FOLEY, JR.
14 United States Magistrate Judge
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